Privy Council Appeal No. 48 of 1944

In the matter of part cargo ex M.V. "Glenroy"

FROM

THE HIGH COURT OF JUSTICE PROBATE, DIVORCE AND ADMIRALTY DIVISIONS (in Prize)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 7TH MARCH, 1945

Present at the Hearing:

LORD MACMILLAN
LORD WRIGHT
LORD PORTER
LORD SIMONDS
LORD GODDARD

[*Delivered by* LORD PORTER]

This is an appeal by H.M. Procurator-General against a decree dated the 21st December, 1943, of the President of the Admiralty Division sitting in Prize dismissing the claim of the Crown that a part cargo of 2,240 bags of Nagauzura beans ex M.V. Glenroy was enemy property or contraband of war and liable to condemnation.

The beans were shipped from Otaru in Japan for carriage to Hamburg in the following circumstances:—

There is in Japan a corporation known as Mitsui Bussan Kabushiki Kaisha (hereinafter called "Mitsui") which carries on business in that country and has a branch in London (registered under the Companies Acts as a branch) called Mitsui & Company Limited (hereinafter referred to as Mitsui, London). Mitsui has since 1910 also carried on a business in Germany, originally at Hamburg through a branch office, and in 1926 this business was incorporated in that country. To this Company were transferred the assets, business and staff employed in Germany, and in 1928 the head office was transferred to Berlin, but Hamburg continued as a branch office of the German Company. The whole of the shares in this Company are owned by Mitsui and their trustees. In addition it is controlled and staffed by Mitsui and is entirely dependent upon that Company. It is really a purchasing and selling house of Mitsui just as are Mitsui's branches elsewhere, and according to a declaration made by Mitsui's manager, although it may be considered as a German Company by reason of its being incorporated in Germany according to German law, yet without the slightest doubt it is for all practical and business purposes considered, even in Germany, as a branch office of a foreign Company.

Mitsui had also a branch at Otaru, in Japan, and by a purchase note dated the 10th July, 1939, and by a sale note dated the 11th July, 1939, Mitsui (Hamburg) confirmed the purchase and Mitsui (Otaru) the sale of the beans, the subject-matter of the present claim. Amongst the terms agreed upon were: Shipment July: Destination Hamburg: Price £17 0s. 0d. per ton c.i.f. Hamburg: Otaru to draw at three months sight against a letter of credit on a bank to be named later. This bank was, by the 5th of August, identified as the Yokohama Specie Bank, and a letter of credit was duly issued by the Hamburg branch of that bank to Otaru, authorising them to draw upon the London branch at three months for account of Mitsui (Hamburg) for the price of the beans. This letter contained instructions that the bills of lading drawn in triplicate were to be made out to

the order of the Yokohama Specie Bank Limited, and the invoices and insurance policy in triplicate in the bank's name or in the name of the shipper and blank endorsed. Two sets of documents were to be sent to the bank at Hamburg and one set, with drafts on London attached, to be delivered to the bank in London against acceptance of the drafts. The drafts were to be drawn and negotiated before the 15th August and to contain the clause " Drawn under letter of credit D.C. No. 7766 dated Hamburg, 5th August, 1939 ". The letter was headed with the words " Drafts drawn under this letter of credit are negotiable through Yokohama Specie Bank Ltd. only ", and ended " We hereby agree with the Drawers, Endorsers and bona fide holders of drafts drawn in accordance with the terms and conditions of this credit that such drafts shall be honoured on presentation at our office in London, provided they are negotiated through the Yokohama Specie Bank Ltd.".

The goods were shipped and bills of lading issued, invoices prepared and insurance taken out on the 31st July, 1939, in accordance with these instructions.

The bills of lading acknowledged shipment on board the M.V. Glenroy and were for delivery at Hamburg unto order of the bank: the invoices stated that the goods were shipped by order and for account of Mitsui (Hamburg) and the insurance policies covered them from Otaru to Hamburg and appear to have been issued under a general cover granted to the Otaru branch and to have been blank endorsed.

On the 7th August, 1939, Mitsui drew a bill in accordance with the credit, negotiated it through the Otaru branch of the bank and advised the London branch of their action, ending with the words, " Drawn under L/C No. 7766 Hamburg, 5th August, 1939 ". A letter to the same effect was sent to the bank's office in Hamburg. When negotiating the bill Mitsui delivered the three sets of documents to the Otaru branch of the bank and on the same day two sets were sent to the bank at Hamburg and one with the draft attached to London where it was received on the 13th September, 1939, and owing to the outbreak of war was not accepted or paid. Meanwhile on the 3rd September war between Great Britain and Germany had broken out, and on the 13th September Mitsui (Hamburg) telegraphed to Mitsui (Otaru) that they had cancelled the contract unconditionally as they saw no way of delivery or payment, and asked the Otaru branch to dispose of the goods as they thought best. On the 14th September before receipt of this message Mitsui (Otaru) had already telegraphed to Mitsui (London) instructing them to telegraph saleable price London or Rotterdam, and on the 16th Otaru cabled " Glenroy Nagauzura sale contract cancelled unconditionally. As to whereabouts and alteration destination consult Y.S.B. (Yokohama Specie Bank) London who hold documents ".

Meanwhile at some date unknown the Glenroy had been diverted to Liverpool where she arrived on the 17th October, 1939, and there on the 2nd November the beans were seized as prize. On that same day the London branch of the bank informed Mitsui (London) that the amount of the bill had been refunded and that they were instructed to hand over the documents free of charge, but were unable to do so as they had forwarded them to H.M. Procurator-General. At the same time they wrote to that gentleman renouncing their claim in favour of Mitsui (London). On the 29th December, 1941, after the entry of Japan into the war, the respondent was under the Trading with the Enemy Act, 1939, and the Defence (Trading with the Enemy) Regulations, 1940, appointed controller of the business of the London branch of Mitsui.

On the 12th June, 1942, the London branch filed a claim on behalf of Mitsui on the ground that the beans were at all material times the property of Mitsui. On the 2nd March, 1943, the respondent entered an appearance as controller and on the 12th March filed a claim on behalf of himself as controller of the London branch and on behalf of Mitsui on the ground that he or the London branch or Mitsui was owner of the goods which, he wrote, had been shipped from Japan before the outbreak of war and were not at time of shipment or any material time contraband.

On the 22nd April, 1943, the respondent was appointed by the Board of Trade to control the winding-up of the London branch, and it was agreed that he should be treated as claiming by virtue of this appointment.

On this form of claim the appellant objected that the respondent could not be heard to represent Mitsui without the Royal Licence and this objection was upheld by the President: the respondent accordingly appears in this appeal only on behalf of himself and of the London branch.

On this state of facts the Crown maintained that the goods were subject to condemnation for three reasons, any one of which would entitle them to succeed.

In the first place it was said that the property had passed to the German Company and therefore the goods were enemy property. In the second, that Mitsui, though themselves at all material times a neutral Company, maintained a business house in Germany, that the goods " appertained to " that house and that therefore they were enemy goods, and lastly, it was said that the goods were admittedly conditional contraband, that they were originally destined for Germany and that though they would be free of taint if the destination were changed within a reasonable time after the outbreak of war, yet in the present case the destination was not changed. The inference, it was submitted, should be drawn that though the M.V. Glenroy with the beans on board had been diverted to Liverpool yet they might have been transhipped and sent on, that the suggestion of Rotterdam as a possible destination might well indicate such an intention and that at any rate the mere fact that they were on a British ship which could not proceed to a German port was not enough to effect a change of destination. The President decided against the Crown on all three arguments.

As to the first he held the contract to be a typical c.i.f. contract. *Prima facie* this is so. It is in terms such a contract, and therefore in the normal case the property would not pass until the documents were taken up and paid for. Section 19 (2) of the Sale of Goods Act, 1893, enacts that " Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal ", and section 19 (3) enacts that in the case where the seller draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

The appellant agrees that in the ordinary case the property in the goods does not pass, but he says this is not an ordinary case.

So far as subsection (2) is concerned he says that normally the bank to whose order the goods are deliverable is the seller's, not the buyer's agent, but that in the present case the bank was the buyer's agent. Further, he says that in any case the intention to reserve the right of disposal is only a *prima facie* one and can be disproved by other circumstances.

The facts on which he relied for this disproof were:—

(1) that the sellers had obtained a letter of credit from the bank undertaking if certain conditions were fulfilled (which in fact were fulfilled) that the drafts would be honoured on presentation at its house in London;

(2) that under the letter of credit two copies of the documents were to be sent to the Hamburg branch of the bank without any conditions being imposed on that bank to withhold delivery in case the draft sent to London was not accepted;

(3) that the draft must be negotiated through a branch of the same bank;

(4) that the relationship of the parties was such that security for payment was immaterial: the profit would go in any case to one or the other;

(5) that the invoice described the goods as shipped " by order and for account of Mitsui (Hamburg) ".

For the purpose of this argument it must of course be assumed that the two Companies are separate entities capable of contracting with one another and so organised that the property may pass from the one to the other. It *had* passed, said the Crown, because the sellers had no interest in retaining it: they had negotiated a bill of exchange and received payment and not only was acceptance and payment to be made by their subsidiary, but they had received a letter of credit from the bank undertaking that it should be honoured: they were no longer interested in the goods: they had been paid in full.

This argument, in their Lordships' view, neglects the liability of the sellers as drawers of the bill of exchange: the bank might fail or some such event might come to pass as in fact occurred in the present case: the sellers were still interested and not only in theory but in fact were very much interested in the final disposal of the goods. Nor do their Lordships think that the provision in the letter of credit that two of the sets of documents were to go to the bank at Hamburg is a circumstance from which an inference as to change of property can be drawn. From a letter sent on the 7th August, 1939, by the Otaru branch of the bank to its Hamburg branch it is plain that the bills of exchange had been drawn on the London office in pursuance of the letter of credit emanating from the Hamburg branch, and that branch from the start was aware that the drafts would be attached to the documents sent to London. The most obvious inference is that the two sets of documents sent to Hamburg were in duplicate for safety's sake and they may well have been transmitted to Germany so that the goods might be released at the earliest moment at which it was known that the bill had been honoured in London without waiting for transmission of the bills of lading thence. In any case the issue of a set of three bills of lading is usual and no inference can, in their Lordships' opinion, be drawn from the mere fact that for convenience sake two are despatched to a destination where they may be required.

No doubt, having regard to the relationship of the parties, the Japanese Company could control the action of the German house, but it may well have been thought desirable to keep their activities, profits and mutual dealings separate.

Finally, it is true that the goods were bought " by order and for account of " Mitsui, Hamburg, but it is plain that Mitsui were not originally principals in this transaction. Mitsui bought the goods, transmitted them to Hamburg and charged the Hamburg house with the price. Neither in this respect nor in the other matters suggested does the transaction seem to be differentiated from an ordinary c.i.f. contract. In their Lordships' view the property had not passed to the Hamburg Company.

In the second place the beans were said to be enemy property not as belonging to the Japanese Company as neutrals but as belonging to a neutral Company which maintained a branch in enemy territory and as appertaining to the business of that branch. For this argument as for the former, it was immaterial whether the goods were contraband or not. In either case they were said to be just as much enemy property as if they had been owned directly by the German Company.

In order to establish this contention the appellant relied upon the principles enunciated in the *Anglo-Mexican* [1918] A.C. 422, viz., that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business.

In order to ascertain whether the goods seized in the present case were or were not liable to be condemned as prize in accordance with this principle three questions have to be answered, viz.:—(1) Does the principle apply where the business is carried on by means of a separate limited company incorporated in the enemy country: (2) are the goods the subject-matter of the present claim sufficiently closely connected with the enemy business; and (3) does the law give the neutral a *locus poenitentiae*, so that the goods escape taint, if, before capture, he has diverted them so that they may not be delivered to the enemy house but to some other destination.

As to the first point their Lordships are of opinion that the German Company though in one sense a separate entity from Mitsui yet is in substance a branch of the Japanese business. The decision in the *Daimler Coy. Ld.* v. *Continental Tyre and Rubber Company (Great Britain) Ld.* [1916] 2 A.C. 307, makes it clear that a Company may be an enemy corporation though registered in this country; the question is where the control lies.

In a case like the present where the control lies in Japan their Lordships think that similar considerations may be applied. The substance, not the form must be observed and in as much as what matter are the facts lying behind the mere formalities of the case, the German Company is just as much the creature of Mitsui, as if it were a branch office staffed with servants directly responsible to the Japanese Company.

As is apparent from the matters already stated every circumstance except the fact of registration in Germany show it to be an alter ego of Mitsui doing Mitsui's business and conforming to Mitsui's wishes. If the mere separation of entities were held to prevent the Germany Company from being a branch of the Japanese Company then the difficulty experienced by a neutral in maintaining a business in a country at war with Great Britain would largely disappear.

In their Lordships' view a company so closely connected with its Japanese founder cannot escape from being held to constitute a house of business of the latter merely because it is separately incorporated.

In the second place it was strenuously contended on behalf of the respondents that whatever might be the relationship between the two Companies the goods in question did not belong to Mitsui (Hamburg) nor were they sufficiently closely connected with its business to make them enemy property.

That goods, the property of neutrals are condemnable only if they have such a connection with the enemy house of trade has been recognized from the days of Lord Stowell in England and for a period of similar length in America. In the *Portland* 3 C. Rob. 41, Lord Stowell speaks of " the property of a British merchant embarked in that trade " (i.e., trade in the enemy country) and later on says " I know of no case, nor of any principle, that could support such a position as this; that a man having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house as in those which belonged to his belligerent domicil." So in the *Venus* 8 Cranch, 253 the majority of those comprising the Court use the expressions " So much of his property concerned in the trade of the enemy as is connected with his residence " and again " As to property engaged in the commerce of the enemy." It is imperative therefore to determine whether in the present case the beans were so closely connected with the German business as to make them enemy property. Throughout the judgments and opinions in the decided cases the expressions used are nowhere very precise. As Sir Arthur Channell says in the *Lutzow* [1918] A.C. 435, at p. 438. " In the cases which establish the rule the property liable to be treated as enemy property is described in words which vary somewhat and which are often rather vague." Two sets of phrasing have already been quoted. In the *Anglo-Mexican* (*supra*) are to be found the expressions " An enemy in respect of his property or interest in such business ", " Will affect the assets of the business house or his interest therein with an enemy character," p. 425. " The original claim put forward in the present case appears to have been framed on the contention that the goods appertained to the American or English branch and not to their German branch . . . The claim however, in this form was abandoned in the Court below, it being admitted that the goods in question could not be regarded otherwise than as appertaining to the German house." No question however of the closeness of connection required arose in that case since the business was carried on by four partners, two of whom were Germans residing in Germany, one a British subject who fled and adhered to Germany on the outbreak of war, and one naturalized American who made the claim as to his share in the partnership. Moreover the head office of the business was in Germany though it had branch offices in England and America.

In the case of the *Lutzow* (*supra*) the connection required did come in issue, since the goods claimed had been purchased by the Hamburg branch of an American firm for another branch in Japan, the purchase being made from certain manufacturers in Germany specified by the Japanese house. The branches were in no sense separate entities but the Hamburg branch paid for the goods with the proceeds of a draft upon the Japanese branch, negotiated with bankers upon the security of the bill of lading; the goods were invoiced at cost price and the profits were divisible between the two branches. The goods were captured but held not to be so connected with the German business as to render them liable to condemnation as enemy property, although a closer connection might have resulted in the American neutrals being treated as enemies in respect of those goods. These being the facts Sir Arthur Channell in considering what connection is necessary between the goods seized in prize and the enemy branch quoted the words from the *Portland* (*supra*) and the *Venus* (*supra*) already set out and quoted also the words of Lord Stowell in the *Jonge Klassina* (1804) 5 C. Rob. 297, " A man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries." The other phrases of which he takes cognizance are (i) " if a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy " (*per* Sir Samuel Evans, P. in the *Manningtry* quoting from Pratt's Edition of Story): (ii) " the property of a house of trade established in the enemy's country is considered liable to condemnation as prize" (Wheaton, Dana's Edit. S. 334), and (iii) from Hall's International Law following the *Jonge Klassina* (*supra*) that a trader in two countries must be regarded as a belligerent or a neutral according to the country in which the transaction has originated.

In himself deciding the question, he uses the expression, " Whether the goods were the concerns of the branch business at Hamburg? " and decides that they were not, on the ground that the Hamburg branch was merely a buying agent and after the purchase not concerned with the goods which were at the time of capture and indeed from shipment the concern of the Japanese branch.

The expressions used in the various cases are set out at some length not because the point now under discussion has been decided in any of them, but because they establish the principle which must guide the Board. Were then the beans seized as prize in the present case so connected with the Hamburg house as to be regarded as its concern?

It was argued on behalf of the respondents that they could not be so regarded; that the very separation of the interest between two Companies resulted in the goods being the concern of that Company in which the property was vested and that so long as the Japanese Company kept control of them they were its and not the Hamburg house's concern. The goods in question never, it was contended, came within the control of the trade of the German house; the credits, securities, or assets with which they were to be paid for did appertain to the German business, but until the property passed the beans did not: goods over which the head office kept control never became the concern of the German branch within the meaning of this doctrine.

Their Lordships do not assent to this argument: the goods were bought for and shipped to the Hamburg house—finance was arranged by them and the letter of credit, obtained by them from the branch of the Yokohama Specie Bank in Hamburg, contained a proviso that drafts must be negotiated through a branch of that bank. Acceptance it is true was to be made in London but again at the office of the same bank and the bill of exchange was to bear the inscription, " Drawn under L/C No. 7766, Hamburg, 5th August, 1939." The bill of lading was endorsed " Notify to Deutsche Mitsui Bussan A.C. Hamburg," i.e., the German house. The invoice stated that the goods were " shipped by order and for account of " the German Company, and the policy was endorsed in blank.

Having regard to these arrangements and provisions their Lordships hold that these goods on the outbreak of war were the concern of the Hamburg branch rather than of the Company in Japan and therefore were enemy property within the principle referred to in the *Anglo-Mexican* (*v.s.*).

There remains the question whether the taint of enemy ownership was removed by the act of the Hamburg branch accepted by the Japanese Company in cancelling the contract and changing the destination of the beans to London or Rotterdam.

There is, no doubt, a mode of repentance by which the taint of enemy ownership may be removed from goods shipped by a neutral firm to an enemy branch. The neutral, by English law at any rate, can do so by discontinuing or dissociating himself from the enemy branch either before capture or, if that occurs before he has had a reasonable opportunity of doing so, by taking steps to do so within a reasonable time: See the *Anglo-Mexican* (*supra*) at page 425. There is no suggestion that any such steps have been taken in the present instance; on the contrary it appears from the affidavit of Mr. Lawton sworn on the 28th April, 1943, that Mitsui had continued to carry on business in Germany until shortly before that date and there is no evidence that they ever desisted. Except by taking this course there is no suggestion in the cases of any other method of rescuing the goods from condemnation. It was suggested that in a case like the present it would be reasonable and in accordance with the practice adopted in the case of contraband that the neutral owner should have an opportunity of removing the enemy taint by changing the destination of the goods at any rate before seizure and that in any case seizure and not the outbreak of war was the vital date. It was, it was said, a harsh doctrine which would condemn the goods though they had been shipped with complete propriety and though the neutral had taken all necessary steps to withdraw them from reaching the enemy.

Their Lordships do not feel themselves able to accept this argument. In a sense it is a hardship, but the neutral is given a locus poenitentiae if he withdraws from the business carried on in the enemy country and he may well be called upon to elect not to continue to assist the trade of the enemy as the price of rescuing his goods from condemnation. In principle in their Lordships' view a withdrawal from enemy destination comes too late if made after the outbreak of war. It is true that Sir Arthur Channell in the *Lutzow* (*supra*) at page 440 says " It is only as enemy property at the date of the capture that they can be condemned if at all." But this observation must be read bearing in mind that the goods were at the outbreak of war enemy goods and having regard to the principle that a change of ownership after war has broken out is not recognised by prize law in the case of goods at sea, see *The Vesta*, etc. [1921] 1 A.C. 774, at page 777, where Lord Sumner quotes the principle as set out by Sir William Scott in the *Vrow Margaretha* I. C. Rob. 336: " In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till actual delivery; this arises out of the state of war which gives a belligerent a right to stop the goods of his enemy."

Where condemnation of the goods is claimed on the ground that they are contraband a different rule prevails, but in the argument under consideration no question of contraband arises, the claim is that the goods are enemy goods. In their Lordships' opinion for the reasons already given they are indeed enemy goods and the principle applicable to enemy goods must be followed without regard to the fact that their enemy character is acquired only because the goods are the concern of an enemy branch of a neutral trader.

A further point was taken on behalf of the Crown but not pressed as decisive of the case. It was not disputed before their Lordships that the cargo was conditional contraband and as such liable to condemnation whilst on a voyage to an enemy port, but it was said that that liability ceased when the ship's voyage was diverted and she was ordered to Liverpool. The President accepted this view and held that diversion in fact was sufficient to free the goods whatever the intention or wish of their owners might be. The Attorney-General contended that this ground of decision is too widely stated. In his submission, at any rate to-day when the doctrine of continuous voyages is freely recognized, it is not enough that the goods

are diverted, unless and until they are disposed of in a non-enemy country or so treated that they cannot reach the enemy country. In the present case he points out that the diversion was not made at the request or with any assent of the owners, nor did they show any unequivocal intention to dispose of the goods in England. The telegrams speak of shipment to London or Rotterdam and Rotterdam, it is suggested, is a convenient port from which goods could be forwarded to Germany. As the point has not been fully argued their Lordships do not think it desirable that they should express any concluded opinion in the matter. The point is open for argument in any future case where the facts admit it. Their Lordships neither affirm nor disaffirm the grounds of this part of the decision below. As to the decision itself however they think that the conclusion might have been drawn that the owners in fact intended to end the voyage at a non-enemy port and withdraw the goods from any enemy destination. Such a finding would be conclusive as to any claim based on contraband.

On the ground however that the goods were enemy goods at the outbreak of war as being the concern of Mitsui (Hamburg) and that Mitsui took no steps to dissociate themselves from the activities of that branch their Lordships hold that the goods were liable to condemnation. They will therefore humbly advise His Majesty that the appeal must be allowed and the decree of the Prize Court set aside ~~with costs~~, and in lieu thereof that it ought to be pronounced that the goods in question belonged at the time of seizure thereof to enemies of His Majesty and, as such, ought to be condemned as good and lawful prize and as droits and perquisites of Admiralty.

The respondent will pay the costs of this appeal.

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In the Privy Council

IN THE MATTER OF PART CARGO ex M.V. "GLENROY"

DELIVERED BY LORD PORTER

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